



4910-9X

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

2 CFR Part 1201

[Docket DOT–OST–2015–0013]

RIN 2105–AE38

Geographic-Based Hiring Preferences in Administering Federal Awards

AGENCY: Office of the Secretary (OST); U.S. Department of Transportation (DOT).

ACTION: Notice of withdrawal of proposed rulemaking and related pilot programs.

SUMMARY: The Department of Transportation (the Department) is withdrawing a Notice of Proposed Rulemaking (NPRM) issued on March 6, 2015, that proposed to amend its regulations implementing the Government-wide Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards to permit recipients and subrecipients of certain DOT funds to impose geographic-based hiring preferences whenever not otherwise prohibited by Federal law. The Department is withdrawing this NPRM because, after review of all comments, the Department has determined that promulgating a provision to allow geographic-based hiring preferences is not practicable for the efficient and cost-effective delivery of projects. Additionally, this Notice rescinds two related pilot programs: 1. Innovative Contracting and 2. FHWA HUD Livability Local Hire Initiative.

DATES: As of [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], the NPRM “Geographic-Based Hiring Preferences in Administering

Federal Awards,” published on March 6, 2015 (80 FR 12092), is withdrawn. As of **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, the Department’s two experimental contracting pilot programs—1. Innovative Contracting (Local Labor Hire) (80 FR 12557), and 2. the FHWA HUD Livability Local Hire Initiative (75 FR 36467)—are withdrawn.

ADDRESSES: U.S. Department of Transportation, 1200 New Jersey Ave. SE., Washington, DC 20590, 202–366–9152.

Electronic Access: You can view and download related documents and public comments by going to the website <http://www.regulations.gov>. Enter the docket number DOT–OST–2015–0013 in the search field.

FOR FURTHER INFORMATION CONTACT: Terence Carlson, Assistant General Counsel for General Law (OST–C10), U.S. Department of Transportation, 1200 New Jersey Ave. SE., Washington, DC 20590, 202–366–9152.

SUPPLEMENTARY INFORMATION:

Background

On March 6, 2015, the Department published an NPRM proposing to amend the Department’s regulations at 2 CFR part 1201 to permit recipients and subrecipients of certain DOT funds to impose geographic-based hiring preferences whenever not otherwise prohibited by Federal law. On March 13, 2015, the American Public Transportation Association (APTA) filed a comment requesting that the Department extend the comment period for the NPRM by 30 days to May 6, 2015. The Department granted APTA’s request on April 8, 2015 (80 FR 18784).

Recipients and subrecipients at the local government level have local hiring provisions that they apply to procurements that do not involve Federal funding. However, the Department's regulations at 2 CFR part 1201, which adopted the Office of Management and Budget's (OMB) revised Government-wide Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal awards to non-Federal entities at 2 CFR part 200 (Common Rule), prohibit the use of in-State or local geographic-based preferences in the evaluation of bids or proposals except where Federal statute mandates or encourages the use of such preferences. This prohibition extends to the use of geographic-based hiring preferences in contracts that are awarded by recipients and subrecipients with Federal financial assistance since such preferences could result in a competitive advantage for contractors based in the targeted hiring area.

Under the NPRM, the Department proposed to amend Part 1201 by promulgating a provision that would have deviated from the OMB guidance by making clear that geographic-based hiring preferences might be used in certain DOT grant programs. However, the proposed deviation would have only applied to the extent that such geographic-based hiring preferences would not have otherwise been prohibited by Federal statute or regulation.

Approximately 181 comments were filed in response to the NPRM. These comments were submitted by approximately 23 contractors, 22 contractor trade groups, 11 rolling stock manufacturers, 4 unions, 14 government agencies, 32 advocacy groups, 70 individuals, and 5 Federal and State elected officials (U.S. Senator Charles E. Schumer, U.S. Representative Tom Reed, Georgia State Senator Nan Orrock, California State Senator Connie M. Leyva, and California State Assembly Member Cheryl R.

Brown). All of the construction and rolling stock industry comments were opposed to the adoption of the proposed rule, while the advocacy groups and unions all were in favor. The individual commenters were split. States and municipalities were mostly in favor of the proposed rule. However, the California Department of Transportation (Caltrans), Regional Transportation District in Denver (RTD-Denver), Foothill Transit, and the Capital Metropolitan Transportation Authority expressed concerns with the implementation of the rule. Generally, commenters agreed that transportation investments and policies can improve access to jobs, education, and goods movement, while providing construction and operations jobs. However, many commenters questioned the assertion that local and geographic-based hiring preferences led to such economic benefits.

Discussion of comments

While there were comments regarding the benefits of transportation investments, commenters opposed to the Department's proposed amendments to Part 1201 expressed concerns about the unintended consequences of the NPRM, including, for example, impacts on safety, competitive bidding, the ability to maintain a well-trained workforce, and increased project costs. Some commenters supported the proposed amendments because, among other reasons, local residents would benefit from such investments. Other commenters explained that the NPRM did not go far enough and should have included other types of preferences, in addition to geographic-based.

The Department's proposed NPRM did not make a distinction by project type (e.g., transit vs. maritime project). Many commenters, especially in the transit arena, expressed strong opposition to the application of the NPRM to rolling stock procurements

because of the potential effect on existing manufacturing plants and the capital and personnel investments already made in specific parts of the country.

Reason for withdrawal

The Department operates two experimental contracting pilot programs under FHWA and FTA's existing authorities: (i) Innovative Contracting (Local Labor Hire) (80 FR 12257) and (ii) FHWA HUD Livability Local Hire Initiative (75 FR 36467). The Local Labor Hire pilot is conducted under 23 U.S.C. 502 (i.e., FHWA's Special Experimental Project No. 14 (SEP-14)) and 49 U.S.C. 5312, 5314 and 5325, and the FHWA HUD initiative is conducted under SEP-14. The Department has used these research authorities to advance non-traditional contracting practices for contracts awarded by FTA and FHWA.

Under SEP-14 and 49 U.S.C. 5312, 5314 and 5325, the Department has the flexibility to experiment with innovative approaches to highway and transit contracting. However, the Department is discontinuing these two pilot programs because of minimal interest from intended participants and the difficulty in evaluating cost effectiveness based upon objective criteria.

For additional background, 23 U.S.C. 112 requires a state transportation department to award contracts using federal highway funds by "competitive bidding, unless the State transportation department demonstrates . . . that some other method is more cost effective." 23 U.S.C. 112(b)(1) (2006). For a bidding process to be "competitive," the state transportation department must award contracts for projects "only on the basis of the lowest responsive bid submitted by a bidder meeting established criteria of responsibility." *Id.* section 112(b)(1). For example, a 1986 opinion from the

Office of Legal Counsel (OLC) at the Department of Justice concluded that section 112 obligated the Secretary of Transportation to withhold federal funding for highway construction contracts that were subject to a New York City law imposing disadvantages on a class of responsible bidders, where the city failed to demonstrate that its departure from competitive bidding requirements was justified by considerations of cost effectiveness. *See Compatibility of New York City Local Law 19 with Federal Highway Act Competitive Bidding Requirements*, 10 Op. O.L.C. 101 (1986) (“*Competitive Bidding Requirements*”). Since that 1986 opinion, FHWA had taken the position that state or local bidding specifications or contract requirements that limit the pool of potential bidders violate section 112’s competition requirement unless they directly relate to the bidder’s performance of the necessary work in a competent and responsible manner.

In 2013, OLC opined that a state or local requirement that has only an incidental effect on the pool of potential bidders or that imposes reasonable requirements related to the performance of the necessary work would not unduly limit competition. However, a requirement that has more than an incidental effect on the pool of potential bidders and does not relate to the work’s performance would unduly limit competition unless it promotes the efficient and effective use of federal funds. OLC stated that generally speaking, state or local government requirements that eliminate or disadvantage a class of potential responsible bidders (and thus have a non-trivial effect on the pool of such bidders) to advance objectives unrelated to the efficient use of federal funds or the integrity of the bidding process (or to the performance of the necessary work in a competent and responsible manner) are likely to unduly impede competition in contravention of the substantive component of section 112’s competitive bidding

requirement. OLC further reaffirmed the view expressed in its 1986 opinion that “the efficient use of federal funds is the touchstone by which the legality of state procurement rules for federally funded highway projects is to be tested,” *Competitive Bidding Requirements*, 10 Op. O.L.C. at 105. In 2013, OLC did not understand section 112’s competitive bidding requirement to compel FHWA to reject every state or local bidding specification or contract requirement that may have the effect of reducing the number of potential bidders for a particular contract.

The stated purpose of this NPRM was to permit recipients and subrecipients of certain DOT grant program funds to impose geographic-based hiring preferences whenever not otherwise prohibited by Federal law. DOT agrees that the efficient use of federal funds is the touchstone by which the legality of state procurement rules, including any proposed geographic-based hiring preferences, for federally funded projects is to be tested. Here, in light of the responses to the NPRM, the lack of data on whether specific local geographic preferences would have an incidental effect on competition, the long-standing Federal government prohibition in the Common Rule on the use of in-State or local geographic-based preferences, the demonstrated minimal interest from intended participants under the two experimental programs, and the inability to evaluate cost-effectiveness based upon objective criteria under the two experimental programs, the Department has determined that promulgating a regulation that would have deviated from the OMB guidance in the Common Rule, by allowing the use of geographic-based hiring preferences in some of the Department’s grant programs, is not practicable for the efficient and cost-effective delivery of projects. The comments received did not include any data that demonstrates that the claimed benefits of the proposed rule justify the costs.

The Department has also determined that an additional request for public comment based on the proposed NPRM would not provide the information needed to accomplish the stated purpose.

Issued in Washington, D.C. on October 2, 2017.

Elaine L. Chao,

Secretary of Transportation.

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